IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CRIMINAL APPLICATION No 325 of 2000

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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BABU BOGHA

Versus

STATE OF GUJARAT

Appearance:

1. Special Criminal Application No. 325 of 2000

MR BHARGAV N BHATT for Petitioner No. 1-17

MR KC SHAH ADDL PUBLIC PROSECUTOR for Respondent No. 1

MR PRAVIN GONDALIYA for Respondent No. 2

NOTICE SERVED BY DS for Respondent No. 3

RULE SERVED for Respondent No. 4

CORAM : MR.JUSTICE A.M.KAPADIA

Date of decision: 14/08/2002

ORAL JUDGEMENT

In this petition filed under Section 482 of the Code of Criminal Procedure ["Code" for short] and Article 227 of the Constitution of India, the petitioners who are accused in Criminal Case No.468 / 1998 filed by respondent No.2 in the Court of Learned Judicial Magistrate First Class, Kalawad for commission of the alleged offence under Section 500 of the Indian Penal Code ["IPC" for short] whereunder process came to be issued, have prayed to quash and set aside the said complaint and the process issued thereunder.

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#. The petitioner Nos.1 to 4 filed a complaint dated 1-6-1997 before the Collector, Jamnagar against the respondent No.2 for cancellation of the licence of the fire arm issued under the authority conferred upon concerned authority by their application. One of the petitioners viz. Viraji Premaji who is petitioner No.15 herein had lodged criminal complaint being Criminal Case No.260 / 1997 before the Court of Learned JMFC, Kalawad against the respondent No.2 and two others for commission of alleged offence under Section 504, 506[2] and 114 of the IPC. In the said complaint, present petitioner had also given their statement. It appears from the record of the case that the petitioners allegedly made a false and frivolous statement in those above referred proceedings. Therefore, the respondent No.2 filed complaint against present petitioners as well as respondent Nos.3 & 4 for making defamatory statement in those two proceedings. Said complaint is annexed as Annexure-A to the petition. In the said complaint, it is interalia alleged against the present petitioners that the evidence which was recorded in the criminal case as well as the Chapter Case taken under the provisions of law are contradictory and the contents thereof are false, fabricated and defamatory and therefore, the respondent No.2 has filed the complaint. The respondent No.2 had further relied upon the evidence which was led in the chapter case as well as the applications, which have been filed before the concerned Collector and before the learned JMFC, Kalawad. It appears from the record of the case that learned JMFC, Kalawad on receipt of the complaint being Criminal Case No.468 / 1998 filed by the respondent No.2 against the present petitioners as well as respondent Nos.3 & 4, after recording verification of the complainant, issued process thereunder for commission of the alleged offence under Section 499 of the IPC punishable under Section 500 of the IPC. The petitioners aggrieved by issuance of the process under the said complaint preferred Criminal Revision Application being Criminal Revision Application No.25 / 1999 before the

Court of Learned Additional Sessions Judge, Jamnagar. The learned Additional Sessions Judge, Jamnagar rejected said revision vide order dated 18th February, 2000 by observing that no illegality has been committed by the learned Magistrate in issuance of the process against the petitioners as well as respondent Nos.3 & 4.

#. The petitioners being aggrieved by the aforesaid order of issuance of process in the complaint bearing Criminal Case No.468 / 1998 which came to be confirmed vide order dated 18th February, 2000 in Criminal Revision Application No.25 / 1999 by the learned Additional Sessions Judge, Jamnagar, have filed this petition by invoking provisions contained in Section 482 of the Code, wherein the relief claimed is to quash and set aside said complaint and process issued thereunder.

#. Mr.Bhargav Bhatt, learned advocate for the petitioners contended that the order of issuance of process is against settled principles of criminal jurisprudence. It is asserted by him that before issuing process, the learned Magistrate has not considered the exceptions enumerated under Section 499 of the IPC. According to him, prior to taking cognizance of the offence, learned Magistrate ought to have seen the effect of its exceptions and unless there is prima facie material on record to indicate that the accusation is not the kind to which any of the exception [exception 8 to Section 499] is attracted, he should issue the process. However, in the instant case the basis to issue process gets vitiated by non application of mind on the part of the learned Magistrate.According to the learned advocate, provisions of Section 195 of the Code specifically deal with the offences categorically and in that giving or fabricating false evidence under Section 193 of the IPC is included.It is also asserted that the basis of the complaint vide Annexure-A relates to giving or fabricating false evidence before the Court and hence prima facie the bar contemplated under Section-195[1][b][i] of the Code is attracted and in the said view of the matter unless that bar is lifted by adopting the proper procedure as contemplated under Section 340 of the Code, no court is competent to issue summons and in the said view of the matter, prima facie, issuance of the summons by the learned JMFC has no scope of judicial competence and jurisdiction and therefore such order of issuing summons deserves to be quashed and set aside by allowing this petition.In support of the aforesaid contentions, Mr.Bhargav Bhatt, learned advocate for petitioners has placed reliance on judgment in case of KALLUMATAM GURUBASAYYA V. SANNA SETRA SIDDALINGAPPA

reported in AIR 1940 Madras 677.

#. Mr.Gondaliya, learned advocate for respondent No.2 / complainant, with all vehemence at his command contended that the petitioners have failed to make out case of quashment of the said complaint and process issued thereunder. According to him, learned Magistrate has applied his mind before issuing the process as the averments made in the complaint prima facie disclose offence under Section 499 punishable under Section 500 of the IPC. He also pointed out that said order of issuance of process was a subject matter of the Revision under Section 397 of the Code before the learned Additional Sessions Judge, Jamnagar which came to be confirmed and therefore, this Court may be loath to interfere in those two orders in exercise of the powers conferred under Section 482 of the Code. It is also asserted by him that offence as alleged against the petitioners under Section 499 of the IPC, has been prima facie made out as the petitioners defamed reputation of the respondent No.2 complainant. Therefore, no interference is called for in the said order of issuance of the process which came to be confirmed in Revision. He, therefore, urged to dismiss this petition.

#. Mr.K.C.Shah, learned APP for respondent No.1 in all his fairness conceded that since alleged defamatory statements were made by the petitioners in two judicial proceedings, one before the Collector and second before the learned Magistrate, Kalawad, without resorting to Section 193 of the IPC, complainant cannot straightaway file complaint for defamation or commission of the alleged offence under Section 499 punishable under Section 500 of the IPC. According to him, it is the prerogative of the Court. Unless, the Court while passing the final order in those two proceedings, orders to initiate action for filing of the complaint under Section 193 of the Code, by following the procedure prescribed under Section 340 of the Code, no complaint can be filed by the complainant straighaway. According to him, this petition deserves to be allowed by quashing and setting aside the order of issuance of process in Criminal Case No.468 / 1998 filed by the respondent No.2 against the present petitioners. He, therefore, urged to pass appropriate orders.

#. I have considered submissions advanced by learned advocates appearing on behalf of the respective parties. I have perused the Memo of petition, averments made therein, impugned order and complaint at Annexure-A, so

also the order passed by the learned Additional Sessions Judge in Criminal Revision Application No.25 / 1999 and other documents forming part of the present petition and the statutory penal provisions contained in Section 499 of IPC and Sections 193, 195 and 340 of the Code.

#. At the outset, there is no dispute that present petitioners Nos.1 to 4 filed a complaint on 1-6-1997 before the Collector, Jamnagar against respondent No.2 praying to cancel the licence of the Fire Arm issued under the authority conferred upon the authority in favour of him. It is also not in dispute that the petitioner No.15 - Viraji Premaji had lodged criminal complaint being Criminal Case No.260 / 1997 in the Court of Learned JMFC, Kalawad against respondent No.2 and two others for commission of the alleged offence under Section 504, 506 [2] and 114 of the IPC. It appears from the record that in those two proceedings, the petitioner made averments, which according to the respondent No.2 are defamatory as said averments were made with intention to harm his reputation and therefore, he had to suffer in the society. There is also no dispute that there is no averment in the complaint that the present petitioners made defamatory statement either in press or before public at large.

#. In view of the aforesaid state of affairs, the only question which calls for determination in this petition is, whether on the basis of said so-called defamatory statement made in those two judicial proceedings against the respondent No.2 - complainant, can he file criminal complaint under Section 499 of the IPC which is punishable under Section 500 of the IPC, evading Section 193 of the IPC. To answer the aforesaid question, it would be advantageous to refer to Section 193 of the IPC which reads as under :-

"193. Whoever intentionally gives false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceeding, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine;

and whoever intentionally gives or fabricates false evidence in any other case, shall be punished with imprisonment of either description for a term which may extend to three years, and

shall also be liable to fine."

##. On having fair look to the aforesaid penal provisions and Section 193 of IPC, it is seen that whoever intentionally gives false evidence in any proceedings, or fabricates false evidence in any stage of a judicial proceeding, or fabricates false evidence for the purpose of being used in any stage of a judicial proceedings, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine. Now the another question which is required to be determined is as to who can file this complaint ? To answer the aforesaid question, this Court has to consider provisions of Section 195 of the Code which empower the Court to file the complaint. The Section 195 [1] reads as under :-

"195[1] No Court shall take congnizance -

[a] [i] of any offence punishable under Sections 172 to 188 [both inclusive] of the Indian Penal Code [45 of 1860], or

[ii] of any abetment of, or attempt to commit, such offence, or

[iii] of any criminal conspiracy to commit such offence, except on the complaint in writing of the public servant concerned or of some other public servant to whom he is administratively subordinate;

[b] [i] of any offence punishable under any of the following sections of the Indian Penal Code [45 of 1860], namely, Sections 193 to 196 [both inclusive], 199, 200, 205 to 211 [both inclusive] and 228, when such offence is alleged to have been committed in, or in relation to, any proceeding in any Court, or

[ii] of any offence described in section 463, or punishable under Section 471, section 475 or section 476, of the said Code, when such offence is alleged to have been committed in respect of a document produced or given in evidence, in a proceeding in any Court, or

[iii] of any criminal conspiracy to commit, or attempt to commit or the abetment of, any offence

specified in sub-clause [i] or sub-clause [ii],

except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate.

[2] ... ...
[3] ... ...
[4] ... ... "

##. On having fair look to the aforesaid provisions, there is no manner of doubt that by virtue of Clause [b] of sub section 195 of the Code, if any offence punishable under any of Sections 193 to 196 [both inclusive], 199, 200, 205 to 211 [both inclusive] and 228 of IPC, if such offence is alleged to have been committed in, or in relation to any proceeding in any Court, no Court shall take cognizance except on the complaint in writing of that Court, or of some other Court to which that Court is subordinate. Therefore, undoubtedly, for filing of the complaint for commission of the alleged offence under Section 193 of the IPC, the complaint has to be filed by the very Court in which alleged false evidence and depositions were made. It may also be appreciated that for filing the complaint under Section 195 of the Code, procedure is prescribed under Section 340 of the Code.

##. Admittedly, in the case on hands, the respondent No.2 has straightaway filed the complaint against the petitioners as well as respondent Nos.3 & 4 for commission of the alleged offence under Section 499 punishable under Section 500 of the IPC for adducing alleged false statement and deposition made in two judicial proceedings viz. one before the Collector and the second before the learned JMFC, Kalawad.

##. In the case of KALLUMATAM GURUBASAYYA [supra], Madras High Court has ruled that the complaint by the Court is necessary for a prosecution for an offence under S.193 and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation. In the said case before Madras High Court, complaint of an offence under Section 500, IPC for defamation was based on an averment made in the plaint filed by the accused aginst the complainant who was defendant No.2 in the suit in the District Munsif's Court, Bellary, praying for partition on the strength of a sale deed executed in his [accused's] favour by one D.The averment complained of was that the complainant was incurring reckless debts on account of drinking and immoral habits which the

complainant stated is false and was made maliciously and wantonly in bad faith and needlessly and with intent to harm his reputation among the public and also to prejudice the Court. After enquiry the Magistrate framed a charge. Said order was the subject matter of challenge before Madras High Court. Madras High Court quashed the said charge by saying that complaint by the Court is necessary for prosecution for an offence under Section 193 of IPC and the parties cannot be permitted to evade that provision of law by filing a complaint of defamation.

##. Applying the principle enunciated by the Madras High Court in above referred to judgment to the facts of the present case, at the risk of repetition, be it stated that as observed above, respondent No.2 has filed complaint for the alleged offence of defamation against the petitioners as well as respondent Nos.3 & 4, on the basis of the allegation that they have created false evidence and deposed falsely which is in the nature of defamatory statement against the respondent No.2 complainant, a complaint by Court is necessary for prosecution of an offence under Section 193 and Section 193 cannot be evaded by filing a complaint of defamation. Therefore, judgment of Madras High Court is squarely applicable to the facts of the present case.

##. Seen in the above context, the order of issuance of process in criminal case No.468 / 1998 filed by the respondent No.2 against present petitioners and respondent Nos.3 & 4, which is confirmed in Revision by the learned Additional Sessions Judge is bad in law and therefore, the same deserves to be quashed and set aside by allowing this petition.

##. For foregoing reasons, petition succeeds and the same is allowed accordingly. Criminal Case No.468 / 1998 and process issued thereunder which is confirmed in Criminal Revision Application No.25 / 1999 are hereby quashed and set aside. Rule is made absolute.

Date : 14-8-2002 [A.M.Kapadia, J.]

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